IN THE

Supreme Court of the United States

OCTOBER TERM 1942

Nos.....

MOORE-McCORMACK LINES, INC.,

Petitioner,

against

EDWARD FOSTER,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Statement

The essential facts are stated in the Petition.

POINT I

The Suits in Admiralty Act, 46 U. S. C. §§ 741, 742, provides the exclusive remedy for injuries arising out of the operation of a merchant vessel owned by the United States and leased by it for operation to a private corporation.

The Court below overlooked the purpose of the Suits in the Admiralty Act (46 U. S. C., §§ 741, 742). This Court has

declared that the purpose of that statute was "* * * to relieve the United States of the inconvenience resulting from seizures" of Government-owned merchant vessels. *Johnson* v. *Fleet Corporation,* 280 U. S. 320, 325. The theory applied by the Court below would permit the seizure of a Government-owned merchant ship chartered to a private vessel operator because the vessel was chartered to such operator. Such theory carried to its logical conclusion would make the Government-owned vessel subject to seizure and delay merely because the Government decided to have the vessel operated under charter rather than by some other method. It was clearly not the intention of Congress to penalize the Government and subject its vessels to seizure because it operated a merchant vessel under one plan, chosen by it, rather than under some other plan.

The Court below has premised its ruling that the Suits in Admiralty Act, does not apply on the theory that a private owner of a merchant vessel leased to a private corporation for operation would not be liable *in rem* under the Jones Act or *in personam;* and further that it is only under the Jones Act that a seaman could sue. This theory manifestly ignores the ancient and basic right of a seaman to file a libel *in rem* in Admiralty seeking damages for injuries sustained as a result of the ship's unseaworthiness. Further, he has a claim against the ship for maintenance and cure, enforceable *in rem* in Admiralty. Both these claims carry the right to seize the vessel. *The Osceola,* 189 U. S. 158, 175. In the instant case, respondent sued for maintenance and cure. He might have alleged the condition of the vessel constituted unseaworthiness, entitling him to a recovery in an action *in rem* in Admiralty. He therefore could have so sued and seized the vessel unless the Suits in Admiralty Act precluded the right. That instead of so

suing respondent chose to sue under the Jones Act does not alter the situation. It is the existence of the right which is determinative of the issue. Thus the Court below was in error in holding as it did.

This Court has already declared that the purpose of the statute was "to relieve the United States of the inconvenience resulting from * * * seizures" *Johnson* v. *Fleet Corp.*, 280 U. S. 320, 325; and to provide a remedy in Admiralty for "adjudicating and satisfying all maritime claims arising out of the possession or operation of merchant shipping of the United States." *Fleet Corp.* v. *Rosenberg Bros.*, 276 U. S. 202. For the Circuit Court to create an exception to this rule would serve no proper purpose and would destroy the very end sought. There can be no question of the Congressional intent. The Act was intended to cover all merchant ships owned by the United States no matter by whom they were operated and all ships operated by the government no matter by whom they were owned. Thus Section 741 is framed in the following equivocal language "*no vessel* owned by the United States * * * or in the possession * * * or operated by or for the United States * * * shall * * * be subject to arrest or seizure."

For the Court below to hold the Act inapplicable is not only to ignore the specific mandate of Congress but the rulings of this Court and what is more important open the door to the seizure of merchant vessels in these times when it is the country's greatest interest to prevent such acts.

Moreover, the decision conflicts with the decision of the same Circuit in *Brady* v. *Roosevelt S. S. Co., Inc.*, 128 Fed. (2d) 169, 170, wherein the Court declared:

> "A prime purpose of the statute was to prevent the seizure in ports of the United States vessels

> owned by the government or its wholly owned corporations in action *in rem*. No distinction was made between seizures from a private operating corporation and from a corporation owned by the government * * *."

An analogous situation was presented to the New York Court of Appeals in *Shea* v. *Export S. S. Corp.*, 253 N. Y. 17. That Court also decreed that the statute barred the action against the private operating corporation.

As for the distinction drawn by the Circuit Court between the instant case and that of *Brady* v. *Roosevelt S. S. Co., Inc., supra*, to wit: "The United States would have been personally liable had it been a private person," we need only point to the express language of the *Brady* case to indicate the error committed.

> "* * * too much regard has been given to the thought that if appellee recovers the judgment will neither be against the government directly or indirectly nor will the United States be compelled to reimburse the agent for damages it may pay * * *. Granted that this is so, it is not decisive for the Suits in Admiralty Act goes beyond the mere protection of any pecuniary interest of the government. A prime purpose * * * was to prevent the seizure * * * of vessels owned by the government * * * in actions *in rem*." (The *Brady* case, p. 170.)

It therefore follows that the decision of the Court below in holding that the Suits in Admiralty Act does not apply in the instant case was erroneous and that the decision of the Circuit Court as well as the judgment of the District Court should be reversed.

POINT II

The operator of a merchant vessel is not guilty of negligence upon the failure of a light to continue to shine where there is no evidence showing why the light went out or that the defendant had knowledge (either actual or constructive) that the light no longer continued to shine.

The Court below in affirming the judgment and verdict of the District Court declared that so long as the scene of the accident was illuminated there was no negligence; the exact words being "the darkness and negligence were dispelled by the light—so long as it lasted." The Court then continued to declare that once the light became extinguished petitioner was *ipso facto* negligent; again the exact words being "Appellant was therefore negligent because it did not show it exercised due care to see to it the light continued to shine." Since there is no evidence to indicate why the light went out or to impute knowledge for petitioner to believe that the light no longer burned, the Court, in effect, ruled that negligence may exist apart from a knowledge of the defective condition. It is respectfully submitted that in so ruling the Circuit Court has departed from the established principles of law and imposed a new standard of care on the operators of merchant shipping.

While it is true there is a duty to maintain proper illumination, the duty is not breached immediately upon the extinguishing of the light. The duty is breached when the defendant has "knowledge or what is deemed in the law to be the same thing; opportunity by the exercise of reasonable diligence to acquire knowledge of peril. *38 Amer. Juris,* § 23, *Sherman & Redfield on Negligence* (re-

vised ed.), § 24. "If what was initially furnished was reasonably safe and adequate and became defective through use * * * it was necessary for knowledge of that fact to be brought home to the officers of the ship before any duty of replacement arose." *Bryant* v. *Vestland*, 52 Fed. (2d) 1078, 1079 (C. C. A. 5).

The Jones Act does not enlarge on the common law rules regarding negligence. *Cortes* v. *Baltimore & Insular Line*, 287 U. S. 367. The burden of proving negligence in respect to the place of injury is on the plaintiff (respondent herein). *Delaware etc. R.R.* v. *Pedersen*, 229 U. S. 146, 148. In the instant case the evidence is that petitioner inspected the lights regularly. Despite respondent's allegation of actual knowledge (Par. 8 E, Bill of Particulars) the record indicates petitioner had no knowledge (either actual or constructive) of the absence of lights (R. p. 26). For the Court below to therefore impose liability because petitioner did not maintain a light is to conflict with the many decisions of this Court, *cf*: *Engle* v. *Davenport*, 271 U. S. 33; *Patton* v. *Texas & P. R.R. Co.*, 179 U. S. 658; *Lingren* v. *U. S.*, 281 U. S. 38.

POINT III

The errors of the trial were so flagrant and highly prejudicial to petitioner's rights as to warrant a new trial.

The petitioner, an operator of American owned ships, comes to this highest Court feeling aggrieved, particularly as to the errors of the trial. It complains that the lower Court has erroneously and tacitly put its stamp of approval on the jury's decision that the rheumatic arthritis of this

53 year old respondent was in some way connected with with his employment on the S/S "Uruguay" (R. pp. 131, 132, 192 to 209, 256, 282, 283, 284).

He was treated for the rheumatic fever in a hospital in Rio De Janeiro until July, 1940 (R. p. 22). His treatment for rheumatic or rhematoid arthritis was continued from July, 1940 to June, 1941 at the U. S. Marine Hospital at Stapleton, Staten Island (R. pp. 126, 127, 220). At the hospitals and while talking to the doctors he emphatically denied that he had received injuries and that his condition was due to an accident (R. pp. 127, 215, 216). The salt air and sea life after 25 years of going to sea, when combined with the attacks of gonorrhea in 1907, 1909 and 1925 affected respondent's resistence to such an extent that he had ordinary or general arthritis in all of his joints (R. pp. 131, 132, 195, 199, 299). See opinions of Dr. Strauss and Dr. Engl. The physicians who treated respondent made no diagnosis of traumatic arthritis. Dr. Arthur A. Michel of the U. S. Government Service brought about a traumatic condition by manipulating respondent's shoulders when he was confined to the U. S. Marine Hospital. Dr. Michel broke the adhesions which had been caused by the arthritis (R. p. 220). In breaking the adhesions, the doctor tore the ligaments in the right shoulder (R. pp. 211, 212, 213, 220).

It would seem that by the affirmance, trial courts may now charge the jury on matters not within the issues embraced within the pleadings. It is asserted that it is erroneous to charge in the alternative; that is, if the jury cannot find for the plaintiff on the premise or theory that a direct blow caused arthritis then the jury may find that a blow aggravated a pre-existing condition of arthritis, when in fact the plaintiff did not have such a pre-existing

condition of arthritis (R. pp. 31, 42, 43, 206). *Carpenter* v. *Baltimore & Ohio Ry. Co.*, 109 F. (2) 375, 379 (C. C. A.); *64 Corpus Juris*, § 746 and § 760.

It is apparent from the opinion that the Appellate Court did not fully realize that the petitioner complained that the Court went outside of the issues and discussed aggravation when a theory of aggravation was diametrically opposed to the respondent's case (R. pp. 3, 4, 5, 206, 266). For, this conclusion is stated as follows, "Appellant objects that this portion of the charge is not warranted by the evidence for there could be no causal connection between the injury in question and the subsequent arthritic condition." The Trial Judge stands charged with full responsibility as to the just outcome of the trial, *Patton* v. *Texas & Pacific Railway Company, supra.*

As was said at page 660 of *Patton* v. *Texas & Pacific Railway Co., supra,* a Judge is not a mere moderator of a town meeting, submitting questions to the jury for a determination, nor simply ruling on admissibility of evidence, but one who in our jurisprudence stands charged with full responsibility. So, with the absence of any accident date, the Trial Court should have dismissed the case. The Trial Court should have at least required the respondent to give the exact date of his accident (R. pp. 63, 64, 65). Failing the established requirement to fix the date of an accident, the Trial Court should have directed a verdict (R. pp. 256, 257). The forthright refusal of the respondent to decide upon a date in June, 1939, after having changed the date of his accident during the trial from October, 1939, served to bar and foreclose the petitioner from complying with what now seems to be the highly exacting requirements of the lower Court as to proof. Although the petitioner could never find out the date of the plaintiff's

accident even during the trial, still according to the opinion it was required to show that it exercised due care to see to it that the light continued to shine at the time of the accident. The opinion states, "Appellant was, therefore, negligent because it did not show that it exercised due care to see to it that the light continued to shine" (R. pp. 282, 283).

CONCLUSION

It is submitted that the serious questions of law vitally affecting public interest is of sufficient importance to require the exercise of this Court's supervisory jurisdiction by a writ of certiorari.

Respectfully submitted,

CORYDON B. DUNHAM,
Attorney for Petitioner.

IRVING L. EVANS,
EUGENE J. DAVIDSON,
Of Counsel.

Dated, December 31, 1942.

[APPENDIX FOLLOWS]